

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	ED CV 15-1051-VBF (SK)	Date	April 12, 2017
Title	Benjamin Lee v. CHP Officer Pirko, et al.		

Present: The Honorable	Steve Kim, United States Magistrate Judge		
Marc Krause		n/a	
Deputy Clerk		Court Smart / Recorder	
Attorneys Present for Plaintiff:		Attorneys Present for Defendants:	
None present		None present	

Proceedings: (IN CHAMBERS) SECOND ORDER TO SHOW CAUSE

Plaintiff was previously ordered to explain and show cause why his First Amended Complaint (FAC) in this 42 U.S.C. § 1983 action should not be dismissed because it alleges claims barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). (ECF Nos. 35, 64). He was also given multiple opportunities to cure this fatal deficiency by filing a Second Amended Complaint (SAC) alleging only claims not foreclosed by *Heck*. (ECF Nos. 64, 68). Instead of amending his complaint to survive *Heck*, however, Plaintiff filed a parallel federal habeas petition (5:17-cv-233-VBF-SK) challenging his underlying state conviction and now seeks, essentially, to stay this § 1983 action pending the outcome of the parallel habeas proceeding. (ECF Nos. 65, 67, 69). But “a § 1983 claim that implicates issues in habeas corpus does not accrue until the prisoner obtains a writ of habeas corpus or similar relief.” *Clayton-El v. Fisher*, 96 F.3d 236, 244 n.4 (7th Cir. 1996) (citing *Heck*, 512 U.S. at 486–87). “[D]ismissal and not a stay would be the proper disposition for a § 1983 claim that was brought prematurely.” *Id.* A “claim is either cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed.” *Edwards v. Balisok*, 520 U.S. 641, 649 (1997).

THEREFORE, Plaintiff is ORDERED TO SHOW CAUSE by no later than April 28, 2017, why this action should not be dismissed since it is barred by *Heck* and not cognizable under § 1983 until and unless habeas relief is first obtained. Plaintiff may discharge this Order to Show Cause in one of two ways: he may either (1) file a SAC that complies with the Court’s prior orders and alleges only claims not barred by *Heck*; or (2) voluntarily dismiss this action without prejudice to re-filing a new § 1983 complaint if and when he is successful in overturning his underlying state conviction. The statute of limitations for a new § 1983 claim would not begin to run until the underlying conviction is invalidated by habeas relief. *See Heck*, 512 U.S. at 489–90. **Any other response, or a failure to respond, to this Order to Show Cause shall result in a recommendation that this action be dismissed for failure to state a claim, disobeying court orders, and/or lack of prosecution.** *See Fed. R. Civ. P. 12(b)(6), 41(b); Local Rule 41-1.* The Clerk is directed to provide Plaintiff with a Notice of Voluntary Dismissal form (CV-009).